No.03-048

IN THE SUPREME COURT OF THE STATE OF MONTANA

CARL ZARNDT and JANET ZARNDT,
Plaintiffs and Appellants.

-vs

JOCK B. WEST,
Defendant and Respondent.

BRIEF OF APPELLANT

On Appeal from the District Court of the
Thirteenth Judicial District of the State of Montana
In and for the County of Yellowstone

APPEARANCES:

BRIAN KOHN
ATTORNEY AT LAW
Old Chamber Building, Suite 100
301 NORTH 27TH STREET
BILLINGS, MONTANA 59101

ATTORNEY FOR RESPONDENT

ROY W. JOHNSON
ATTORNEY AT LAW
926 MAIN, SUITE # 23
BILLINGS, MONTANA 59105

ATTORNEY FOR APPELLANT

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NO. 03-048

IN THE SUPREME COURT OF THE STATE OF MONTANA

CARL ZARNDT and JANET ZARNDT Plaintiffs and Appellants, vs. JOCK B. WEST, Defendant and Respondent	)))))

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether or not Plaintiffs were entitled to a hearing upon the motion to dismiss filed by the Defendant.

2. Whether or not the Statute of Limitations had expired in this case is a question of fact.

STATEMENT OF THE CASE

Plaintiffs filed their complaint against the Defendant on the 6th day of September, 2002, (District Court file, Doc. 1) alleging damages suffered as a result of a negligent advice given by Defendant. The affirmative defense of the Statute of Limitations for failure to file the claim withing three years of the date of injury was raised by Defendant.(District Court file, Doe. 2) Also, the Court was moved to Dismiss the Complaint under District Court Rule for failure to respond within the time provided by the rule, and for Rule 11 Sanctions. The District Court deemed the matter submitted upon the filing of an objection by Plaintiffs. No hearing was held by the District Court.

The District Court dismissed the case based upon the

affirmative Defense of the Statute of Limitations. The District Court ruled upon the Rule 11 motion, finding there to be no violation. That portion of the District Court Order was not appealed, nor was the fact the District Court did not apply the rule for failure to file a brief withing 10 days. The Court refused to treat with the issue of how Summary Judgement may or may not have applied in the case. Notice of Entry of the Order of the District Court was filed and served, and this appeal timely followed.

STATEMENT OF THE FACTS

The Plaintiffs were Defendants in a civil action in the Thirteenth Judicial District, Yellowstone County Montana, in Cause no. DV 98-102 and were about to have an adverse judgment entered against them. The Plaintiffs approached Mr. West for a second opinion, which advice he reiterated in a letter dated April 19, 1999. (Exhibit A to document 1, District Court file) Carl Zarndt filed an appeal with the Montana Supreme Court from the Judgement rendered by the Hon. Maurice R. Colberg in DV 98-102. On December 28th, 1999, the Supreme Court appeal, Case no. 99-401 was dismissed upon Joint motion of Plaintiffs and Defendant Carl Zarndt.

SUMMARY OF ARGUMENT

That where negligent legal advice is given, it is a question

of fact as to when the Statute of Limitations starts to run. Further, because there was no hearing in this case, none of the "information" considered by the Court was under oath, nor was there an opportunity to argue before the District Court and present sworn testimony and factual evidence for the Court to consider. Further, a hearing was required because the matter was treated as a motion for summary judgement.

ARGUMENT

I. The Statute of Limitations applicable to this matter provides:

> 27-2-206. Actions for legal Malpractice
>
> An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by the attorney based upon the person's allegedprofessionalnegligent act or omission in the person's practice must be commenced within 3 years after plaintiff discovers or through the use of reasonable diligence shouldhave discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

In analyzing the above statute, the District Court determined that April 14, 1999 (the date of transfer of assets by Appellant) or May 7, 1999 are reasonable dates for the Appellants to have been aware that **malpractice may have occurred.** Emphasis supplied (District Court Order, page 4 lines 20 through 24)

Unfortunately, the District Court, although using information

outside the pleadings, Ordered no hearing, and thus did not have before it any testimony concerning the actual date upon which the Appellants may have suffered damage based upon the advice of Defendant. Uhler v. Doak, 268 Mont. 191, 885 P2d. 1297, it was stated that 27-2-102(1) (a), provides that: A claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action.

In order to establish a cause of action for legal malpractice, there must be a showing that the attorney owed his client a duty of care, that there was a breach of this duty by a failure to use reasonable care and skill, and that the breach was the proximate cause of the client's injury and resulted in damages.

In Uhler it is also stated the facts essential to the cause of action include damages as a proximate result of that breach. For a Court to hold otherwise could result in the claim for relief being barred by the statute of limitations before it ever accrued.

In short, a hearing upon when the damage, if any was done, is necessary before a determination as to whether the affirmative defense applies.

In a motion to dismiss made pursuant to Rule 12 (b)(6), M.R.Civ.P., a court must view the allegations in a light most

favorable to the plaintiff, admitting and accepting as true all facts well-pleaded. Farris v. Hutchinson (1992), 254 Mont. 334, 336, 838 P.2d 374, 375. A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief. Farris, 838 P.2d at 375.

In ruling upon the motion to dismiss, without a hearing, the Court did not have the opportunity to consider when the Defendants were actually damaged by the alleged malpractice. Nor did the Appellants have an opportunity to present testimony and evidence.

Since the lower Court ruled as it did, without hearing, there is no record to which Mr. Zarndt can point in this appeal to explain why the Statute did not begin to run until he was forced to dismiss his appeal in cause DV 98-102. The Montana Supreme Court has stated time and time again it cannot and will not treat with issues or facts first raised upon appeal. Since the District Court held no hearing during which those facts and issues could have been raised by the Appellant, the Appellant is hamstrung to point out facts and argue issues concerning the starting date of the Statue of Limitations.

The District Court also determined, since it ruled on a motion to dismiss, it did not have to treat with the issue of whether Summary judgment rules applied to this case. Again, no hearing, no record. no opportunity.

While it is acknowledged by Appellants that a Motion to Dismiss can, under certain circumstances be granted without hearing, the vast majority of the cases reported have indicated a hearing was held.

The District Court obviously did rely upon information outside the pleadings in reaching it's decision, such as various letters reflecting correspondene between counsel in the underlying case, and attorney Patton in the present case. It is respectfully submitted this informaiton was outside the pleadings and a hearing was required. The Court was, in fact, treating the matter as one for Summary Judgement, and dismissed the matter with Predjudice.

CONCLUSION

Accordingly, the Supreme Court should remand the matter for hearing upon the Motion to Dismiss relative to the Statute of Limitation.

Respectfully submitted this 24 day of February, 2003.

Roy W Johnson
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Roy W. Johnson, do hereby certify that on the 27 day of February, 2003, I served the foregoing on opposing counsel of record by depositing the same in the U.S. Mails, postage prepaid thereon, addressed as follows:

Brian Kohn
Attorney at Law
Old Chamber Building, Suite 100
301 North 27th Street
Billings, Montana 59101

Roy W Johnson, Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 03-048

CARL ZARNDT and JANET ZARNDT Plaintiffs and Appellants	)
vs	)
JOCK B. WEST Defendant and Respondent	)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a Courier monospaced typeface having 12 characters per inch; is double spaced except for footnotes and quoted and indented material; and does not exceed 50 pages, excluding table of contents, table of citations, certificate of service and addendum (if any).

Dated this ~~day~~ 27th of February, 2003

Roy W Johnson
Attorney at Law
926 Main, Suite #23
Billings, Montana 5915

BY: _____
Roy W Johnson

APPENDIX TO
APPELLANTS' BRIEF

Johnson Law Office, PLLC
Roy W. Johnson
926 Main, Ste #23
Billings, Montana 59105
406-245-4079
Attorney for Plaintiffs

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Carl Zarndt and Janet Zarndt)
)
Plaintiff,) CAUSE NO. DV 02-0779
) Judge: SUSAN P. WATTERS
vs.)
)
Jock B. West) COMPLAINT
)
Defendant _____)

For my claim, I allege:

COUNT ONE

1. Plaintiff, was, at all times mentioned here, a citizen of the State of Montana, residing in Yellowstone County.

2. Defendant, was at all times mentioned herein, a Montana Attorney, with his principal place of business in Billings, Montana.

3. All events complained of herein occurred in Yellowstone County, Montana

4. In addition to the Defendant named above, certain other persons, firms, corporations and/or partnerships may have participated in the violations alleged herein and performed acts and made statement in furtherance thereof. This complaint may be

amended as the involvement of these individuals and entities becomes more defined.

5. This Court has personal jurisdiction over Defendant and Sections 25-2-118(1) and 25-2-122,MCA., provide venue in this Court.

6. Plaintiffs sought a second opinion from Defendant concerning a legal matter; namely for advice concerning a judgement against the Plaintiffs. The advice given to the Plaintiffs is contained in the letter attached hereto as exhibit A. The advice contained in the letter was followed and resulted in the loss of certain pre-judgement exemptions, thus damaging plaintiffs to a significant degree. Additionally he was required to perform his duties to plaintiffs in a professional and competent manner. His failure to exercise reasonable care, skill and diligence in representing Plaintiffs and was a breach of duty owed to the Defendant and the proximate cause of damage to the Plaintiff in a amount to be stated upon demand for damages or proven at trial.

WHEREFORE, Plaintiff prays for judgment as follows:

1. An award for pecuniary loss.

2. An award of such general and consequential damages for breach of contract as are proven at trial

3. An award of damages for negligence as are proven at trial

4. An award of damages for emotional distress

2

5. Costs and disbursements herein

6. For such other and further relief as the Court deems just.

DATED this 6 day of September, 2002

Roy W. Johnson
Attorney for Plaintiffs

Professional Corporations
Attorneys-at-Law

Jock B. West, P.C.
James A. Patten
Bruce 0. Bekkedahl *
W. Scott Green, P.C.

* *Also Admitted in North Dakota & Arizona*

SUITE 100, OLD CHAMBER BUILDING
301 NORTH 27TH STREET
BILLINGS MONTANA 59101

Writer's Direct Line: (406) 252-3858
Facsimile Line: (406) 248-4770

April 19, 1999

Mr. and Mrs. Carl Zamdt
General Delivery
Huntley, Montana 59037

Re: Conference of *April 14, 1999*

Dear Carl and Janice:

This letter is written to outline our discussions of April 14, 1999. I was concerned as to your level of stress due to the adverse judgment which has been entered against Carl and your daughter. The purpose of this letter is to outline the few options which you have to protect yourself from the upcoming judgment.

first, following our meeting, I have contacted the Clerk of the District Court. I have confirmed that there is not a judgment filed at this time. Therefore. the **transfer** of Carl's interest to Janice will have value. In review. once the judgment is entered. then all real property located within the county of filing will be effected. Based upon the information provided, your homestead election, and your outstanding debt shall cover and protect the property at this time. One issue that I do not recall discussing is whether you have filed a homestead election. If you have not, please contact this office and we will prepare the appropriate documents for filing.

With the transfer of Carl's interest to Janice. you are not out of the woods yet. I make this comment since I warned you that the transfer at this time is considered a fraudulent transfer within the civil law. In the event that the opposing side does not discover that the property was transferred for two years. then you will not be in jeopardy. In the event that the judgment creditor discovers the transfer, then the judgment creditor may take action to set aside the transfer. Your current course of action will be to quietly wait out the two year period.

The reason that I feit you needed to transfer Carl's interest on Wednesday was that if you take no steps and rely solely upon your outstanding bank debt and homestead, you will be caught in a trap years down the road when you want to s&your property or refinance the property. If you sell the property, then you will have to pay off the judgment at that time. If **you** refinance the property, you will also have to pay off the judgment. Thus. the judgment creditor ultimately obtains satisfaction based upon his judgment lien which encumbers your property. Since the property did not have vast equity. it is not my expectation that

the judgment creditor would attempt to sell your property, pay off the bank and pay off your homestead and rely upon the remaining equity to off set the judgment. I have had that type of action happen only on one occasion. The only reason that that occurred was the fact that there was substantial equity to be obtain by the judgment creditor.

As for all of your other assets which are in Carl's name or jointly held. I recommend to take the same steps. Divest Car! of all assets. The exception to this advise may be your vehicles due to the low market value. in the event that you wish to sell the two vehicles and obtain a new one. there would be no problem with that action as long as you do not pay cash for a new vehicle and have a high priced vehicle with no debt against the vehicle. The management of your cash assets should be done on a normal basis. Normal being defined as when people routinely move assets around in the money market, stock market etc. The only emphasis in this case is that as you move assets around, Carl's name will be moved from ownership.

Finally. we discussed the possibility of a writ ofexecution being filed against Carl's wages. Please note that his federal social security check is exempt. Thus, the only asset that could be grabbed by the judgment creditor would be approximately 25% of his monthly wage. I would anticipate that they may come after this amount. As stated. his strategy may be to have Roy Johnson talk with George Radovich as to ways that you could work on the judgment. This may hold them at bay for one to two years. The significance of the one year period is in keeping with the possibility of filing a bankruptcy.

In regard to bankruptcy, any transaction with a family member is suspect for one year. Thus. the petition with jusr Carl's name on it could not be filed during the first year. The fraudulent transfer rules would still be available during that one year period if Carl was the sole petitioner. In the event that both Carl and Janice petition, a different observation would be arrived at. Due to the question raised by Janice. I would be happy to review the possibility of filing a bankruptcy at this time. If you wish to have that review completed. then as stated. please advise and I will send the bankruptcy forms. I will review the information and provide an opinion as to whether you qualify under a chapter 7 (liquidation) or chapter 13 (consumer reorganization) approach.

If I can be of any further service. please advise.

Sincerely,

WEST, PATTEN, BEKKEDAHL & GREEN, P.L.L.C.

Jock B. West

JBW:klf

\realty\zarndt\carl11

3rian Kohn
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ATTORNEY FOR DEFENDANT

OPPOSING COUNSEL'S COPY

ORIGINAL

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

CARL ZARNDT AND JANET ZARNDT, Plaintiffs, vs. JOCK B. WEST, Defendant.	Cause No. DV 02-0779 Judge Gregory R. Todd **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR RULE 11 SANCTIONS**

INTRODUCTION

COMES NOW the above named Defendant, by and through his attorney of record, Brian Kohn, and submits this Memorandum in support of his Motion to Dismiss and Motion for Rule 11 Sanctions.

SUMMARY OF CASE

The Plaintiffs filed a complaint on the 6th day of September, 2002. The Complaint is based upon §27-2-206, MCA, "Actions for Legal Malpractice". Said statute is limited by a statute of limitations of three years. The complaint was filed beyond the running of the statute. The filing of the complaint was vexious and sanctions are warranted.

I. MOTION TO DISMISS:

Argument: The complaint filed on September 6, 2002 violates the three (3) year Statute of Limitation set forth in §27-2-206, MCA, (full text attached hereto as Exhibit 'A'). As is set fort1 in the complaint of the Plaintiffs, the transfer of Mr. Zarndt's interest in real estate took place or April 14, 1999. The Plaintiffs therefore had specific knowledge as to the date of transfer. Ir addition, Plaintiffs' attorney, Roy W. Johnson had specific knowledge as to the transfer and issue

as to the bankruptcy exemption as of August 16, 1999. At best, this date constitutes an additional "date of discovery". Exhibit 'B' attached hereto is a copy of the correspondence delivered from George Radovich, the attorney representing the parties who obtained the adverse judgment against the Zarndts (see Exhibit 'C' attached hereto). Roy W. Johnson has been in possession of this letter since August 16, 1999. Said letter clearly establishes an alternative discovery date. This date was three years prior to the filing of the September 6th, 2002 complaint. In addition to the expiration of 3 years from the discovery date, the Plaintiffs have no damage. The Plaintiffs did not file a bankruptcy petition. (See Exhibit 'D' attached hereto.) Had Plaintiffs' filed a bankruptcy petition, they had the right to use their homestead election as is referenced in the complaint.

II. MOTION FOR RULE 11 SANCTIONS:

Argument: In addition to the dismissal of the action, the moving party requests this Court to issue Rule 11 sanction against Roy W. Johnson and the Plaintiffs, Carl Zarndt and Janet Zarndt. Rule 11 sanctions are appropriate against the party who signed the pleadings,(Roy W. Johnson), and the represented parties (Carl Zarndt and Janet Zarndt) if a pleading is entered for an improper purpose such as to harass, cause unnecessary delay, or needlessly increasing the cost of litigation. In addition, the signator to a pleading is certifying that he has read the pleading and that, to the best of the Signor's knowledge, the information and the belief formed after reasonable inquiry is well grounded in fact and warranted by existing law of good faith argument. As is set forth in the preceeding portion of this memorandum, Roy W. Johnson was the attorney representing Mr. and Mrs. Zarndt in cause numbers DV 98-102, and DV 98-0791, Montana Thirteenth Judicial District. In said actions, the Plaintiffs recovered judgment against Carl W. Zarndt and Janice A. Zarndt. In regard to the "discovery date", a direct communication between George Radovich and Roy W. Johnson exists concerning the transfer of real property. Exhibit 'B' to this memorandum shows the date of the both oral contact and written confirmation of August 16, 1999. There can be no conclusion other than the pleadings were filed simply to harass, embarrass and cause needless litigation expense.

Next, Roy W. Johnson and the Plaintiffs violated the duty imposed to inquire as to the grounds of the complaint or basis therefore. Attached hereto as Exhibit 'D' is the correspondence of A.' James Patten, pertaining to the bankruptcy law for the state of Montana. Had Roy W. Johnson made any inquiry into the bankruptcy laws, he would have concluded that the homestead exemption existed and was available for Carl Zarndt to exercise in the case at hand. Had Roy W. Johnson filed a homestead election and/or bankruptcy petition, he would have protected his clients. The clear intent of the complaint was to pass the failure on the part of Roy W. Johnson to a third party, There is no excuse for this type of conduct. Said conduct is sanctionable.

CONCLUSION

The complaint, on its face, fails for violation of section §27-2-206, MCA and should be dismissed.

The complaint was filed merely to harass, embarrass, and cause unnecessary litigation expense. It is clearly a violation of Rule 11 and sanctions should be imposed. Further, this Court should assess reasonable expenses incurred herein.

DATED this 27 day of September, 2002.

Brian Kohn
301 North 27th Street, Suite 100
Billings, Montana 59101

By: _____
BRIAN KOHN,
Attorney For Defendant

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CERTIFICATE OF SERVICE

This is to certify that on this 27th day of September, 2002, the undersigned duly served a copy of the foregoing document via hand delivery, facsimile and/or first class, postage prepaid U.S. Mail, upon the following:

ROY W. JOHNSON
ATTORNEY AT LAW
926 MAIN, SUITE # 23
BILLINGS, MT 59105

for BRIAN KOHN

*22885 MCA 27-Z-206

MONTANA CODE ANNOTATED
TITLE 27. CIVIL LIABILITY, REMEDIES, AND LIMITATIONS
CHAPTER 2. STATUTES OF LIMITATIONS
PART 2. TIME LIMITS ON SPECIFIC KINDS OF ACTIONS

Current through the 2001 Regular Session of the 57th Legislature, chapters 1 to 594 and includes Resolutions, HJR 1 to 44, HR1 and 2, SJR1 to 22 and SR1 to 25

27-2-206. Actions for legal malpractice

An action against an attorney licensed to practice Law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

History: En. 93-2625 by Sec. 1, Ch. 220, L. 1977; R.C.M. 1947, 93-2625.

NOTES, REFERENCES, AND ANNOTATIONS

Case *Notes*

Legal Malpractice Claim Ean-cd by Statute of Limitations -- Continuing Tort Theory Inapplicable: The plain language of this section requires that a legal malpractice action bc commenced within 3 years after plaintiff discovers or should have discovered the allegedly negligent act, error, or omission at issue, but does not permit an overlay of a continuing damage or injury theory that would toll the statute of limitations. Here, the legal malpractice claim accrued no later than December 9. 1393, but the action was filed on December 19, 1996. and thus was barred by the 3-year statute of limitations. Plaintiff's claim of fraudulent concealment under Monroe v. Harper, 164 M 23. 518 P2d 788 (1974), was not addressed on appeal because the theory had not been raised in District Court. Johnson v. Barrett, 1999 *MT 176,* __M__, 983 P2d 925, 56 St. Rep. *639 (1999).*

No Extension of Statute of Rcposc Under Equity Principics: The omission that gave rise to Joyce's claim for legal malpractice was attorney Garnaas's failure to serve a summons within the 3-year time limit. Joyce claimed a second cause of action in Garnaas's failure to notify Joyce about the status of the case even after the underlying action was lost, arguing that the concealment of a claim is a separate tort that resets the start dale for the statutes of limitations and repose. However, there was no separate claim in this case, in addition to the alleged malpractice, because that claim was subsumed within the initial malpractice. Joyce argued on appeal that the statute of repose should be extended in this case because: (I) an attorney who intentionally misleads a client regarding the true status of a case is not entitled to claim the benefit of the statute of repose because the attorney would b e allowed to take advantage of his wrong, in violation of 1-3-208: or (2) equitable estoppel should bar Garnaas from taking advantage of his *wrong* while asserting a strict legal right. in violation *of 2-i-2-102.* In this case, however, principles of equity did not extend the otherwise absolute statute of repose. Section 27-2-102 does not apply to legal malpractice actions. Further, Joyce's allegations of continuing fraudulent concealment failed because claims for damages against Garnaas for not informing Joyce of the legal malpractice related back to the date that the summons was not served. Thus, Joyce could not claim any actual damages separate from Garnaas's original omission. which was barred by the statute of repose. Joyce v. Garnaas, 1999 MT 170, __M__, 983 P2d 369, 56 St. Rep. 661 (1999).

*22886 Statute of Repose Absolute -- No Toiling hy Fraudulent Concealment: The 3-vear statute of limitations, within which an action For professional negligence against an attorney must be brought, contains a built-in tolling mechanism for a defendant's fraudulent concealment of a plaintiff's injury and does not begin to run until the plaintiff discovers, or with reasonable diligence should have discovered, the error, act. or omission. Not to provide some tolling in those circumstances would inequitably allow the defendant to usc the statute. intended as a device for fairness. to perpetrate a fraud. On the other hand. the 10-year statute of repose in this section is the absolute time limit beyond which liability no longer exists. Nor even fraudulent concealment can toll the statute of repose. Joyce v Garnaas. 1999 M T 170, __M__, 983 P2d *369,* 56 St. Rop. 661 (1999), following Blackburn v. Blue Mtn. Women's Clinic. *286* M 60. 951 P2d I (1997). See also First United Methodist Church of Hyattsville v. U.S. Gypsum co.. 882 F2d *862* (4th Cir. 1989).

Attorney's Failure to Protect Money of Client Who Warned Him of Possible Theft by Escrow Agent: Mills. the seller under a contract for deed, hired an attorney to find out why the escrow agent for the parties to the contract was missing payments to Mills and making other payments late.

EXHIBIT A

tabbies

The attorney also represented Mills in the buyer's resale of the house. Mills told the attorney that she thought the escrow agent was a thief and to make sure that no money went through the agent on the resale. There were indications that the attorney did not take Mills seriously. After the resale, Mills received no money and the escrow agent was convicted of crimes arising from the handling of various escrow accounts. It was improper Lo grant the attorney summary judgment in Mills' malpractice action because there were fact issues on the elements of' the attorney's duty and breach, among which was Mills' assertion that it was foreseeable by the attorney that the escrow agent would embezzle Mills' money and that she would not have lost her money if the attorney had not failed to act to protect her interests. Mills v. Mather,270 M 188, 890 P2d 1277, 52 St. Rep. I39 (1995). See also Lopez v. Great Falls Prc-Release Serv., Inc., 1999 MT 199, __M__, __P2d__, 56 St. Rep. 771 (1999).

Eicmcnts of Malpractice Action: To establish a cause of action for attorney malpractice, there must be a showing that the attorney owed the client a duty of care, that the attorney breached that duty by failure to use reasonable care and skill, and that the breach was the proximate cause of injury to the client. resulting in damages. Mills v. Mather, 270 M188, 890 P2d 1277. 52 St. Rep. 139 (1995). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, __M__, __P2d__, 56 St. Rep. 77 l (1999).

Statute of Limitations -- Cannot Begin to Run at Start of Attorney-Client Relationship: Uhler retained Doak to advise and represent him in a dispute with his business associates. On May 16, 1989, Doak advised Uhler to not sue to enforce a stock buy out provision and bonus provision in his agreement with his associates. Uhler was unwilling to accept this advice and continued to meet with Doak to discuss the situation and to provide Doak with more information concerning the situation. On June 16, 1989, Uhler signed a resignation letter and on June 22, 1989, Uhler executed an agreement that waived the stock buy out and bonus provisions. On June I, 1992, Uhler filed suit against Doak for malpractice. The lower court granted Doak summary judgment on the basis that Doak had advised Uhler to waive his stock buy ou: and bonus rights on May 16, 1989, and never changed that advice; therefore. the statute of limitations commenced to run at that tine. The Supreme Court held that the statute of limitations does not commence to run unti! the cause of action accrues and that in the present case, Uhler suffered no damages until he signed the resignation letter on June 16, 1359. Uhler v. Doak, 268 M 191, 885 P2d 1297, 51 St. Rep. 1315 (1994), partially reversing Boles v. Simonton, 242 M 394, 791 P2d 755 (1990).

*22887 Disqualification in Malpractice Action of Judge Who Represented Plaintiff in Underlying Matter: A judge who had represented plaintiff on the underlying guardianship accounting matter prior to the time that the attorney being sued for malpractice began to represent plaintiff a s to the accountinghouid have disqualified himself from presiding over the malpractice action. A judge may preside over a matter involving a former client if the action over which the judge presides involves a matter different from the one as to which the judge represented the client. In this case. the malpractice action is technically a separate action from the underlying accounting proceeding; however, the malpractice action arose from the legal representation in the accounting proceeding. Default judgment for plaintiff for failure of attorney to plead or in any manner appear was rcvcrscd and remanded for a ruling. before another judge. on attorney's motion for relief from judgment for excusable neglect. Shultz v. Hooks. 263 M 233, 867 P2d I I IO. 5 I St. Rep. 34 (1994)

Suit Filed by Unauthorized Foreign Corporation Tolls Statute of Limitations: A foreign corporation with an expired certificate of authority to do business in Montana filed suit for legal malpractice. The suit was dismissed due to the lapsed certificate. When the corporation refiled the lawsuit, defendants argued that the action was barred by the statute of limitations. Section 35-1- 1004 merely suspends rather than bars further legal proceedings until a certificate is obtained. The Supreme Court held that the corporation could file a lawsuit even though its certificate was expired and the filing had roiled the statute of limitations. Watson & Associates, Inc. v. Green, MacDonald, & Kirscher, 253 M 29 1, 833 P2d 199, 49 St. Rep. 550 (1992).

Contract Not Containing Saving Clause: The buyers and seller of a gas station jointly retained the defendant to draft the real estate purchase agreement for them. The contract provided that upon 3 default in the payments, the seller could declare the total balance due. The buyers failed to make several payments, and the seller accelerated the contract and ultimately took back the property. The buyers sued the attorney for negligence in failing to include a saving clause in the contract that would have allowed them to bring the contract current by making up the missed payments. The Supreme Court held that the action was barred by the statute of limitations because the time commenced to run when the buyers read the contract. The court ruled that the buyers were held to understand the terms of the document that they read and signed. Boles v. Simonton, 242 M 394, 791 P2d 755, 47 St. Rep. 793 (1990). partially reversed in Uhler v. Doak, 268 M 191, 885 P2d 1297. 51 St. Rep. 1315 (1994).

No "Continuous Representation" Doctrine in Legal Malpractice Cases. Although adopted statutorily in some states, the doctrine of "continuous representation" in legal malpractice actions, whereby the 3-year statute of limitations must be tolled until such time as an attorney ceases to represent the plaintiff, is absent from this section and is not recognized in Montana as a matter of law Schneider v. Leaphart, 228 M 483, 743 P2d 613, 44 St. Rep 1699 (1987).

No "Damage Rule" in Legal Malpractice Statute of Limitations Cases: The rule that the statute of limitations in a legal malpractice action does not run until plaintiff discovers his actual and determinable damages. otherwise known as the "damage rule", is neither recognized in Montana nor required by this section. Schneider v. Leaphart.

228 M 483, 743 P2d 613.44 St. Rep. 1699 (1987), followed in Young v. Datsopoulos, 243 M 466, 817 P2d 225, 48 St. Rep. 786 (1991), and in Rouanc v. Lynaugh, 259 M 171, 855 P2d 114, 50 St. Rep. 745 (1993).

*22888 Tolling of Statute -- Test to Be Discovery of Facts: Plaintiff brought a legal malpractice action against defendant arising out of defendant's handling of a dissolution of marriage in 1978. The malpractice claim was filed in January 1982. The District Court granted summary Judgment to defendant based on the Statute of Limitations. The Supreme Court, relying on California precedent, stated that it is the knowledge of facts rather than the discovery of legal theory that is the test for tolling the Statute of Limitations. It was incumbent on plaintiff to commence his malpractice action within 3 years after he discovered or should have discovered defendant's alleged negligent acts, errors, or omissions. Because the claim was based on three separate acts, it was necessary to determine the date of discovery for each act. The court noted that 27-2-206 does not suspend accrual until the "attorney-client" relationship has terminated. The case was remanded to determine the dates of discovery. Burgett v. Flaherty, 204 M 169, 663 P2d 332, 40 St. Rep. 748 (1983), followed in Estate of Halko v. Dawson, 231 M 283, 751 P2d 1064, 45 St. Rep. 611 (1988), McMillan v. Landoe, Brown, Planalp, Kommers & Johnstone, P.C., 233 M 483, 760 P2d 758, 45 St. Rep. 1662 (1988), in Rouanc v. Lynaugh, 259 M 171, 855 P2d 114, 50 St. Rep. 745 (1993), and Loney v. Dye, 281 M 240,934 P2d 169, 54 St. Rep. 153 (1997). See also Peschel v. Jones, 232 M 516, 760 P2d 51, 45 St. Rep. 1244 (1988), Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), and Young v. Datsopoulos, 249 M 466, 817 P2d 225, 48 St Rep. 786 (1991).

Law Review Articles

Legal Malpractice: A Calculus for Reform. Huszagh & Molloy, 37 Mont. L. Rev. 279 (1976).

Collateral References

Limitation of Actions + 95.

53 C J.S. Limitations of Actions § 69

7 Am. Jur. 2d Attorneys at Law §§ 212 through 253.

GEORGE T. RADOVICH
ATTORNEY AT LAW
926 Main, Suite 9
Billings, MT 59105
Telephone: (406)259-4000
Fax: (406)259-5447

August 16, 1999

Roy W. Johnson
Attorney at Law
926 Main, Suite #23
Billings, MT 59105

faxed to: (406) 245-4279

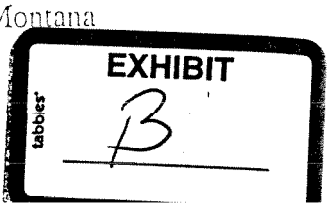
RE: Donut Hole

Dear Bi l:

In accordance with our conversation of August 16, 1999, I hereby request that your clients, Carl Zarndt and Carrie Blackford, provide the information provided for in our agreement of July 27, 1999. That information should be in the form of a sworn financial statement, and should contain, at a minimum, the items referenced on that agreement. I would like, for example, an indication of where the extra money has gone. The statement I received, along with the tax returns, shows that Carl had approximately $60,000 and that his expenses, including all of the expenses to support his wife, total approximately $2,000 per month. He shows no money in his bank accounts, no investments that have accumulated and no transfers that would account for the extra money. Not only does the present income seem to disappear? but the money that should have accumulated since the Donut Hole was closed has disappeared.

The other issue is the house and, following my conversation with you yesterday, I began a relatively large research project to determine the effects of the transfer of the house. In the first place, he transferred the house only to his wife, not to his daughter. The deed was recorded on April 14, 1999, which was shortly after the Court's March 25, 1999, Findings and Conclusions. Clearly, this is a fraudulent conveyance under the Montana Fraudulent Conveyances Act (specifically, §3 t-2-334, MCA) and we are, therefore? entitled to the relief set forth in $3 l-2-339, MCA, including avoidance of the transfer to satisfy our claim, the appointment of a receiver or a direct order, under sub-section 2, for execution against the property.

I have done a great deal of work to determine the effect of this transfer, and have concluded that, since Carl has divested himself of all interest in the property, he has eliminated his Homestead Declaration by waiver. If the property is again put in his name, either through a voluntary act or by virtue of a Court order, our judgment lien will attach immediately when he obtains the property, under §25-9-301, MCA, and it will take priority over any subsequent homestead that he might try to file. There are two ALR articles on the subject, but only one rather old Montana



case but the law seems clear.

In a nutshell, the effect of all of this is that we now have an unrestricted right to collect by taking a ½ interest in the house. We are taking only Carl's interest, so Jan's Homestead or lack thereof makes no difference to us and we plan to sell the house, pay off the mortgage and split the remaining proceeds with Jan, with Carl to get anything we have left after the judgment is satisfied. I did look at the statutes you mentioned dealing with dividing the property, but they clearly do not apply since a single family residence cannot be divided into two portions, so we can proceed directly with the sale, which we intend to start this week by filing suit against Carl and Jan to set aside the fraudulent conveyance and seeking an order that Carl's ½ interest be sold.

If Carl wants to make some other arrangement in the meantime, I suggest that he act now. My legal fees are mounting and, now that our right to Carl's equity in the residence is clear, we have no reason to delay, particularly in view of his actual fraud in this matter.

Finally, your client has eliminated the possibility of filing bankruptcy because the bankruptcy trustee would certainly pursue the residence anyway. In short, your client has placed himself in a much worse position than he was in before and we intend to proceed against the residence with all due haste unless, of course, he files a bond and thereby obtains a stay of our collection actions during the pendency of the appeal.

Thank you.

Sincerely,

George T. Radovich

GTR/gr
cc: Robert Pribyl
Paulette Kohman (by fax)
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GEORGE T. RADOVICH
Attorney at Law
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(406) 259-4000
Attorney for Plaintiffs

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

B.P., INC., a Montana corporation, ROBERT PRIBYL and PAMELA PRIBYL,

Plaintiffs,

-vs-

CARL W. ZARNDT, JANICE A. ZARNDT and LISA JOHNSON,

Defendants.

CAUSE NO. DV 99-0791

Judge: Russell C. Fagg

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs and, in support of their Motion for Summary Judgment in this matter, respectfully submit the following Brief:

FACTS

There are no genuine issues of material fact in this case. The Defendant, Carl W. Zarndt, owned and operated a Montana limited liability company known as CLC, LLC, which purchased and operated a business known as the Donut Hole located in the Billings Heights area in Yellowstone County, Montana. When that limited liability company purchased the Donut Hole business, Carl W. Zarndt and Carrie Blackford, his daughter, executed personal guarantees and both the business and the guarantors ultimately defaulted on that contract by failing to make contract payments. The result was a default notice followed by litigation which was commenced on February 9, 1998, as Case No. DV 98-102, in the Montana Thirteenth Judicial District Court

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for Yellowstone County, Montana. That litigation named as Defendants the limited liability company and the guarantors.

On January 19, 1999, trial of the above-referenced case was held before Maurice R. Colberg, Jr., District Court Judge, and the Court entered its Findings of Fact and Conclusions of Law on March 25, 1999, in favor of the Plaintiffs and against both the limited liability company and the guarantors. On May 7, 1999, Judgment was entered in accordance with those Findings of Fact and Conclusions of Law in the. amount of FORTY-SIX THOUSAND EIGHT HUNDRED THIRTY DOLLARS AND THIRTY-NINE CENTS ($46,830.39), including attorney's fees, together with interest thereon at the rate of EIGHT PERCENT (8%) per annum.

After the entry of the Court's Findings of Fact and Conclusions of Law on March 25, 1999, the Defendants in the present action, Carl W. Zamdt and Janice A. Zarndt, executed and caused to be recorded a Quit Claim Deed transferring real properly consisting of the primary residence of Carl and Janice (his wife) to Janice only. Obviously, by the time that deed was recorded, both Janice and Carl had, with the delay being a result of a required hearing for the notice of the **Court's** Findings of Fact and Conclusions of Law. They were also notified that a separate hearing was set for a determination of proper attorney's fees, which were ultimately the subject of a Stipulation.

In addition to the transfer of his residence, Carl Zamdt transferred a 1991 Cadillac to his wife, Janice Zamdt, and transferred various investment accounts jointly to his wife, Janice, and his daughter, Lisa Johnson who, although she was one of the owners and operators of the Donut Hole had not signed a personal guarantee for the purchase contract.

LAW AND ARGUMENT

§3 I-2-334, MCA, which is part of the Uniform Fraudulent Transfer Act, specifically states, without any determination of fact being required, that a transfer is fraudulent as to a creditor if (1) the creditor's claim arose before the transfer, (2)there was no reasonably equivalent value in exchange for the transfer and (3) the debtor was insolvent at the time of the

transfer or as a result of the transfer. Very clearly, each of these elements is satisfied herein. The transfers were done after the Court had advised all parties of its ruling, without any payment at all as consideration and rendered Carl Zarndt insolvent, as shown by the personal notes prepared by Carl Zamdt and attached to the affidavit filed concurrently herewith. Since there is no additional factual deternination required under the terms of that statute, it does absolutely and unequivocally establish the Plaintiffs' right to recover Judgment as requested herein.

Further review of the Montana Uniform Fraudulent Transfer Act reveals other valid theories under which the Plaintiffs are entitled to recover. The Act very clearly defines fraudulent transfers as those that are done with the actual intent to "hinder, delay, or defraud any creditor of the debtor" or without receiving a "reasonably equivalent value" when the debtor had reason to believe that he would incur debts beyond his ability to pay as they became due. Without even considering the actual intent to hinder, delay or defraud, it is crystal clear in this case that the transfer was done without reasonably equivalent value being given in exchange, since there was no consideration whatsoever, and Carl Zarndt has continually asserted an inability to pay the Judgment, which he cannot presently deny. A copy of the handwritten notes prepared by Carl Zamdt himself are appended to the Affidavit filed concurrently herewith and demonstrate both the transfers alleged in the Complaint and his inability to pay the Judgment recovered herein as a result of those transfers.

Of course, the actual intent to hinder, delay or defraud the Judgment creditors in this matter is also quite clear and allows relief under the Act. In determining that intent, § 3 1-2-333(2), MCA, directs us to consider, among other things, whether the transfer was made to an insider (in this case, the wife and daughter of the Judgment debtor), whether the debtor retained possession or control of the property after the transfer (he continues to reside in the residence and has full access to the automobile and, presumably, to the investments as well), whether the transfer or obligation was disclosed or concealed (the transfers were not revealed until the mediation following the filing of a Notice of Appeal to the State Supreme Court}, whether the

debtor had been sued or threatened with suit prior to the transfer (the Findings of Fact and Conclusions of Law had already been entered against the debtor), whether the transfer was of substantially all of the debtor's assets (as his notes show, there was very little left), whether the debtor received reasonably equivalent value (he received nothing at all), whether the transfer occurred shortly before or shortly after a substantial debt was incurred (ii occurred within approximately one month after the Findings of Fact and Conclusions of Law were entered), and several other factors unrelated to the present case. Obviously, there can be no question that the purpose of these transfers was to move these assets beyond the reach of the Judgment creditors and that no legitimate purpose was served by these transfers.

The Plaintiffs herein are entitled to recover based on any of the theories set forth herein and the availability of three legal theories, each of which suffice independently to justify recovery, makes the case overwhelming.

RELIEF SOUGHT

The relief available to a creditor under the Uniform Fraudulent Transfer Act is specifically set forth in Section 3 I-2-339, MCA. In this case, the Plaintiffs seek specific relief under Section 3 1-2-339(l)(b), MCA, which provides that they are entitled to an attachment against the asset transferred or other property of the transferee. Therefore, the Plaintiffs seek an Order that the now severed ONE-HALF (½) interest in the family residence and the Debtor's now severed ONE-HALF (½) interest in the 1991 Cadillac be sold at sheriff's saie with the proceeds, up to the amount of the judgment with accrued interest and the costs of this action be remitted to the Plaintiffs. The Plaintiffs also ask that Judgment in an amount equal to the value of the other assets transferred be given against each transferee. The funds which were transferred are delineated in the handwriting of the Defendant, Carl Zarndt, as attached to the Affidavit filed herewith and Judgment in that value should be rendered against the Defendants, Lisa Johnson and Janice Zamdt.

Finally, the Plaintiffs arc entitled to an award of their attorney's fees and costs under the underlying agreements and a separate hearing should be set for the determination of those fees and costs.

DATED THIS 8 day of October, 1999.

GEORGE T. RADOVICH
Attorney for Plaintiffs

CERTIFICATE OF PERSONAL SERVICE

I, GEORGE T. RADOVICH, do hereby certify that on the 8 day of October, 1999, I served the foregoing an opposing counsel by personally delivering the same to his office at 926 Main, Suite #23, Billings, MT 59105.

GEORGE T. RADOVICH

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Attorney for Piaintiffs

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

B.P., INC., a Montana corporation, ROBERT PRIBYL and PAMELA PRIBYL,	CAUSE NO. DV 99-079 1
	Judge: Russell C. Fagg
Piaintiffs,	
-vs-	MOTION FOR SUMMARY JUDGMENT
CARL W. ZARNDT, JANICE A. ZARNDT and LISA JOHNSON,	
Defendants.	

****

COMES NOW GEORGE T. RADOV CH, attorney for the Plaintiffs, and moves the Court for Summary Judgment herein in accordance with Rule 56 of the Montana Rules of Civil Procedure. This Motion is based on all facts and matters of record herein, the Affidavit filed concurrently herewith, the official record of the Clerk and Recorder of Yeilowstone County, Montana, specifically that certain Quit Claim Deed recorded on April 14, 1999, a copy of which is appended to the Complaint on file herein and the Court file in Case No. DV 98-102 in the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone. The Piaintiffs specifically request that the Court take judicial notice of the records of the office of the Clerk and Recorder and the District Court file referenced in this Motion.

DATED THIS 8 day of October, 1999.

GEORGE T. RADOVICH
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I, GEORGE T. RADOVICH, do hereby certify that on the 8 day of October, 1999, served the foregoing on opposing counsel of record by depositing the same in the U.S. Mails, postage prepaid thereon, addressed as follows:

ROY W. JOHNSON
926 Main, Suite #23
Billings, MT 59105

GEORGE T. RADOVICH

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MT-STAT-AN - MT ST 70-32-103, From whose property homestead may be selected

---------- Excerpt from page 50455 follows ----------
70-32-103. From whose property homestead may be selected

If the claimant be married, the hosestead may be selected from the property of either spouse When the claimant is not married, the 'homestead may be selected from any of his or her property.

PATTEN, PETERMAN, BEKKEDAHL & GREEN, P.L.L.C.
Attorneys-at-Law

James A. Patten
Patricia D. Peterman
Bruce O. Bekkedahl *
W. Scott Green

* *Also Admitted In North Dakota & Arizona*

SUITE 300, THE FRATT BUILDING
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BILLINGS MONTANA 59101

Telephone: (406) 252-8500
Facsimile Line: (406) 294-9500
Email Address: japatten@wpbglaw.com

September 25, 2002

Sent by Facsimile (248-4770)

Jock West
West Law Firm
301 North 27th, Suite 100
Billings, MT 59101

Re: Zarndt

Dear Jock:

After I got back to my office, I looked in the Bankruptcy Court records to see what happened in the Zarndt case. There has been no bankruptcy filed. I am thinking that what happened is that Radovich simply fooled Johnson into a settlement. If a bankruptcy was filed the claim is an asset of the bankruptcy estate. If the malpractice occurred when the property was quit claimed, then it happened pre-bankruptcy. It is a contingent claim that the debtor had at the commencement of the bankruptcy case and therefore an asset of the bankruptcy estate. I had a case involving Steve Mackey much like it years ago and the law is clear that it is the bankruptcy trustee, and not rhe debtor that owns the claim.

In any event, it appears to me that George buffaloed Johnson regarding the homestead. Zarndt could have had the property quit claimed back to he and his wife and then filed a homestead declaration on it. Even though the homestead declaration followed the filing of the judgment, that is of no consequence whatsoever in terms of the validity of the homestead. You can file a valid homestead a minute before the sheriff sale and it will stop the sale.

If Johnson simply rolled over at Radovich's demands; then he is the one who has malpracticed, not you. Your letter sets out the risks of a conveyance, you are not liable if Johnson screwed it up after that.

Sincerely yours,

PATTEN, PETERMAN, BEKKEDAHL, & GREEN

James A. Patten

JAP/mb

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

CARL ZARNDT AND JANET ZARNDT,

Plaintiffs,

vs.

JOCK B. WEST,

Defendant.

Cause No. DV 02-0779

Judge Gregory R. Todd

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION FOR RULE 11 SANCTIONS

BACKGROUND

Defendant Jock B. West, by and through his counsel of record, Brian Kohn, filed a motion to dismiss the above named complaint. Additionally, Defendant moves this Court to impose Rule 11 sanctions against Roy W. Johnson, Attorney for the Plaintiffs Both motions were filed on September 27, 2002.

Ten business days plus an additional three business days passed without a response from Plaintiffs. On the fourteenth business day, October 18, 2002, Defendant filed a Motion To Enter Judgment On Behalf Of Defendant Pursuant To Rule 2, Uniform District Court Rules. On October 22, 2002, Plaintiffs Carl and Janet Zarndt, by and through their counsel of record, Roy W. Johnson, filed an answer to the Defendant's motion entitled Brief In Opposition To Motion To Dismiss And To Enter Judgment.

The Court, therefore, having received briefs in support and opposition to the Defendant's motions, deems this motion fully submitted for decision.

MEMORANDUM

STATEMENT OF FACTS

On September 6, 2002, the Plaintiffs filed a Complaint against Defendant Jock B. West for Legal Malpractice pursuant to § 27-z-206, MCA. The Defendant answered the complaint by timely raising the Statute of Limitations defense.

On April 14, 1999, a transfer of land took place involving the Plaintiffs and another party represented by George T. Radovich. At that time, Plaintiffs were being represented by Roy W. Johnson in cause DV 98-102. Mr. Johnson also represented the Plaintiffs in DV 99-0791. The Plaintiffs were about to have adverse judgment entered against them in cause DV 98-102, so the Plaintiffs approached Mr. West to receive a second opinion. In their complaint, the Plaintiffs allege that they followed Mr. West's advice to them in a letter dated April 19, 1999 and suffered damages from following such advice. Plaintiffs further allege that Mr. West breached his duties of reasonable care and this resulted in the loss of certain pre-judgment exemptions, and various other damages.

On August 16, 1999, Mr. Radovich sent Mr. Johnson a letter regarding the transfer of land, and the possibility of the transfer of various other assets. In this Augus 16, 1999 letter, Mr. Radovich alerted Mr. Johnson to what would happen if a bankruptcy petition were filed, Mr. Radovich related further that Carl Zarndt divested himself of all interest in the property by transferring the land and this transfer of land eliminated his Homestead Declaration by waiver.

DISCUSSION

The Court is aware that Defendant filed his two motions on September 27, **2002,** and that the Plaintiffs did not answer the. motions until October 22, 2002. Sixteen (16) business days passed before the Plaintiff finally answered the motions. Rule 2, Uniform District Court Rules states "[f]ailure to file an Answer Brief by the adverse party within ten days shall be deemed an admission that the motion is well taken." The motions in this case were ripe for a summary ruling on October 18, 2002. However, a request for sanctions was filed and Plaintiffs did respond. Therefore, the Court will address the Motion to Dismiss and the Rule 11 Motion and not rule summarily.

I. Motion To Dismiss

The Statute of Limitation is an affirmative defense under Rule 8 of Montana Rules of Civil Procedure:

> (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.
>
> Mont. R. Civ. P. 8(c).

Pursuant to Title 27, Chapter 2 of Montana Code, the following statute sets forth the statutory time period to bring a legal malpractice claim.

> 27-2-206. Actions for legal malpractice
> An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

Mont. Code Ann. § 27-2-206 (2001).

Pursuant to § 27-2-206, MCA, the statutory period to bring a legal malpractice claim is within three (3) years from the date of discovery or reasonable date of discovery. The transfer of Zarndt's real estate took place on April 14, 1999. On Augusi 16, 1999, Roy W. Johnson was sent a letter from George T. Radovich referencing the sale of the land. Thus Mr. Johnson had specific knowledge of the transfer, and was on notice of the possibility of the filing of a bankruptcy, and the homestead exemption. Mr. Johnson has been in possession of the letter since August 16, 1999. The complaint in this matter was filed on September 6, 2002.

The Plaintiffs in this matter were on notice of the transfer and its attendant circumstances when adverse judgment was entered against them on May 7, 1999. Mr. Johnson was on notice of the transfer of land when George Radovich sent him the lette dated August 16, 1999. The world was on notice of the transfer of land by the Plaintiffs when they recorded the quitclaim deed in the Yellowstone County Clerk and Recorder's Office on April 14, 1999. The various other transfers that divested Carl Zarndt of asset: were brought to Mr. Johnson's attention in his direct communication with George Radovich on August 16, 1999. (Def's Ex. B, p.1, at ¶ 1.)

The Court declines to address whether malpractice was committed by the Defendant. However, the Court concludes that the date of the transfer, April 14, 1999, and the date of adverse judgment in the case DV 98-102 against the Plaintiffs on May 7 1999 are reasonable discovery dates for the Plaintiffs to be aware that malpractice may have occurred. Additionally, Mr. Johnson was alerted to the fact that the transfers of land and other assets took place when George T. Radovich sent him the letter dated

August 16, 1999. Therefore, Mr. Johnson was aware of the land transfers on August 16, 1999. The Court declines to extend the reasonable date of discovery past August 16, 1999.

The complaint in this case was filed on September 6, 2002. The complaint was filed more than three years after the transfer of land, the entry of adverse judgment in cause DV 98-102, and the date that Mr. Johnson became aware of the transfer of land. Consequently, the Plaintiffs legal malpractice claim against Defendant is time barred.

2. Motion For Rule 11 Sanctions

> Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. if a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
>
> Mont. R. Civ. P. 11 (2002).

In this case, the Court finds that Mr. Johnson did not bring a legal malpractice claim on behalf of his clients that was merely to harass, embarrass, delay, and cause unnecessary litigation expense. The fact that the Defendant made an inquiry to a third party regarding the bankruptcy laws and whether malpractice occurred, supports the

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fact that Mr. Johnson's filing of a legal malpractice claim may be cognizable and not subject to Rule 11 sanctions. See (Defendant's Ex. D.)

Therefore, the Court declines to impose sanction on Mr. Roy W. Johnson.

The Court will now address the Plaintiffs Response. Defendant's motion to dismiss in this case is Defendant's answer to Plaintiffs complaint. A quick glance at the procedural posture of this case indicates that the case is not even ready for a motion for summary judgment since the Defendant's motions are structured as an answer to Plaintiffs malpractice claim. Since the Court has decided to dismiss the case pursuant to an affirmative defense, the Court refuses to address the validity of summary judgment and how it applies in this case.

ORDER

Accordingly,

IT IS ORDERED that Defendant's Motion To Dismiss is GRANTED and that Plaintiff's Claim for Legal Malpractice against Defendant is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendant's Motion For Rule 11 Sanctions is DENIED.

DATED AND ORDERED this 6th day of November, 2002.

Gregory R. Todd, District Court Judge
Thirteenth Judicial District

cc. Roy W. Johnson – Attorney for Plaintiffs
Brian Kohn -Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that the foregoing was Caused to be served upon the parties or their Attorneys of record at their last-known 4ddress this 6th day of November, 2002.

BY _____
Russell E. LaFontaine
Law Clerk to HON. GREGORY R. TODD

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IN THE SUPREME COURT
OF THE STATE OF MONTANA
****
Case No. 99-40 1
****

B.P. INC., a Montana corporation, ROBERT PRIBYL and PAMELA PRIBYL,

Plaintiffs and Respondents,

and

CLC, LLC, a Montana Limited Liability Company; and CARL W. ZARNDT and CARRIE BLACKFORD,

Defendants and Appellants.

****

ORDER

UPON Joint Motion of the Parties executed in accordance with Rule 22 of the Montana Rules of Appellate Procedure, and good cause appearing therefore,

IT IS HEREBY ORDERED that the above-entitled appeal be, and the same is hereby, DISMISSED.

Dated December 28th, 1999.

J. A. Turnage

Supreme Court Justice